

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-184260

DATE: March 30, 1976

MATTER OF: S. J. Groves & Sons Company

98438

DIGEST:

1. Where bidder seeks to withdraw its bid based upon alleged error and furnishes evidence to make prima facie case in support of error, i.e., substantially establishes error, for Government to make award it must virtually show that no error was made or that claim of error was not made in good faith. Therefore, upon ultimate determination that bona fide error was committed, withdrawal is permissible.
2. In mistake in bid cases involving errors of omission, bidder's sworn affidavit outlining nature of error, its approximate magnitude and manner in which error occurred can constitute substantial evidence thereof. This fact does not, however, detract from agency's obligation to weigh all evidence so as to determine that bona fide mistake was committed.
3. Cases discussing withdrawal of bid due to mistake do not speak to materiality of mistake made but rather to whether mistake was honest one. Thus, where magnitude of mistake is not de minimis (between 1.6 percent and 3.2 percent of \$11.8 million bid), withdrawal may be permitted.
4. Where award on combination of schedules is contemplated, award must result in lowest cost to Government. Accordingly, where bidder, whose bid when combined with protester's bid provided lowest cost to Government, withdraws bid, it is then incumbent on agency to make award based on combination of bidders whose bids were still available for acceptance which represented lowest cost.
5. Protest filed after agency forwarded notice of award of construction contract to low bidder must be considered as being filed after award since telegraphic notice of award constituted official award of contract.

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6. Where it would have been near impossibility to ascertain intended bid price of bidder alleging mistake, and while bidder would still have been low even adding entire amount of claimed mistake, still it would not have been possible to make award to bidder for sum certain which is required by regulations.

Invitation for bids (IFB) serial No. DACW68-75-B-0055 was issued by the Corps of Engineers, Walla Walla District, on March 27, 1975. The IFB sought bids for the construction of powerhouse extensions at three dam sites in the State of Washington as follows: schedule "A" - Little Goose Lock and Dam; schedule "B" - Lower Granite Lock and Dam; schedule "C" - Lower Monumental Lock and Dam. The IFB permitted bidders to bid on individual schedules or any combination thereof. The pertinent portion of the IFB's award section indicated that:

"* * * the work will be awarded to the lowest responsible and responsive bidder by Schedule or any combination of Schedules whichever is in the best interest of the Government."

Upon bid opening, May 29, 1975, the following three bids were received:

	<u>Valley Inland Pacific Constructors, Inc.</u>	<u>Groves</u>	<u>Guy F. Atkinson Company</u>
Schedule A	\$11,849,090	\$14,261,571	\$14,887,440
Schedule B	12,104,006	14,142,713	14,346,825
Schedule C	13,458,281	14,524,291	15,113,012
Schedules A and B		28,450,556	28,351,350
Schedules A and C		28,582,339	28,706,920
Schedules B and C		28,468,277	28,540,547
Schedules A, B and C		42,625,005	42,168,036

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Valley's bid was conditioned upon the award to it of only one of the three schedules.

As can be seen from an analysis of the abstract, the apparent low awardees would be Valley for schedule "A" and Groves for schedules "B" and "C," which would have resulted in a total price of \$40,317,367.

However, on June 12, 1975, Valley telephoned the Corps to assert that there were mistakes in its bid. Subsequently, on June 13, representatives of Valley presented arguments and submitted documents to the contracting officer and his staff and requested withdrawal of the bid. One of the documents submitted was a sworn affidavit from the president of Valley which outlined the basis for its request for withdrawal. The affidavit indicated that substantial inadvertent mistakes had been made in the following nine areas: (1) drayage - electrical items; (2) power for pumps for unwatering; (3) header for unwatering; (4) handling and setting up stoplogs; (5) powerhouse crane operator; (6) storage area grading, fencing and heating; (7) extension error of bid item 49; (8) transportation of Government-furnished equipment; (9) markup on above, including taxes, bond, etc. Valley indicated that the above-noted mistakes resulted in the submission of a bid on schedule "A" which was in excess of \$580,000 below the bid actually intended. Similarly, it stated that the extent of the mistakes in schedules "B" and "C" was approximately the same as those in schedule "A." The basis stated for the mistakes was that they resulted from the rush of the estimating team to complete the estimate and to submit a timely bid. As noted above, these errors were discussed in a meeting with the contracting officer on June 13, 1975. During the course of that meeting, the Corps' estimator and the president of Valley reviewed in detail all of the claimed mistakes. After this detailed examination was concluded, the contracting officer in a sworn affidavit states:

"I was presented with the results and was then satisfied that there were several mistakes in the bid and that there was no way of determining the intended bid from the bid preparation documents. At that time, I felt that I had no choice under ASPR regulations [Armed Services Procurement Regulation] but to permit a withdrawal of the bid. I instructed Mr. Gall to routinely prepare Determinations and Findings [D&F] which are required to be made in such cases."

Paragraph "d" of the D&F dated June 17, 1975, states:

"Review of the work papers clearly indicates that a bona fide mistake was made. However, since no prices were developed during the estimating process for several cost items, the intended bid cannot be accurately determined. Estimated total of mistake is \$580,000 for each schedule."

Paragraph 3 of the determinations section states that the bidder will be allowed to withdraw its bid as requested. Also, on June 17, 1975, the contracting officer sent Valley a letter indicating that "Your request to have your bid withdrawn on above-referenced invitation, due to an alleged mistake in bid, has been approved."

On June 17, 1975, a conversation took place among a vice president of Groves, counsel for Groves and an attorney for the Corps during which time Groves' vice president related that in prior conversations with the president of Valley, he had indicated that contrary to the assertions made in June 12 affidavit, Valley had in fact been unable to locate any mistake in its bid. Groves was requested to prepare an affidavit summarizing the conversation of June 6 and to submit it to the Corps for its consideration. Some time later in the day on June 17, the above-noted D&F was prepared. The conversation referenced above between Groves and the Corps was mentioned as was the information which Groves related to the Corps at that time regarding its June 6 conversation with representatives of Valley. Paragraph 2 of the contracting officer's determination states that:

"In making this determination, I have given full and complete consideration to the conversations of 1975 June 06 between the bidder [Valley] and * * * [the above-referenced vice president of Groves]. Assuming for the purpose of this determination that the matters related by * * * [the Groves vice president] are entirely true and accurate, statements made by the bidder on 1975 June 06 are not inconsistent with the bona fide existence of a mistake or mistakes in the bid of Valley Inland Pacific Constructors, Inc., which were unknown to the bidder's representatives at that time, but which were discovered at some later time."

On June 18, 1975, Groves sent a telegram to the Corps which in pertinent part argued that irrespective of the mistake in bid claim asserted by Valley on schedule "A," Groves is entitled to award of

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schedules "B" and "C." Groves also requested reasonable advance notice of any award under the IFB.

On June 19, at 1 p.m., P.d.t., the Corps gave telegraphic notice of award of schedules "A," "B" and "C" to Atkinson since the Corps determined that Atkinson had offered the next lowest available combination for the award of schedules "A," "B" and "C." The agency report indicates that at 2 p.m., P.d.t., Groves' attorney was informed by telephone of this decision and action. At 3:26 p.m., P.d.t., the same information was dispatched to Groves' attorney by teletype. On June 20, 1975, Groves telexed its protest to our Office where it was received at 9:59 a.m. and logged in the Office of General Counsel. The basis of Groves' protest was (a) the failure to award the IFB to Groves on schedules "B" and "C"; and (b) the Corps' improper acceptance of Valley's claim of error in permitting withdrawal of its bid (1) without clear and convincing evidence of any material error in that bid, (2) without considering all available evidence relating to the claim of error, and (3) without finding or attempting to find the amount of the mistake.

On June 25, 1975, Groves filed civil action No. C75-451V, entitled S. J. Groves & Sons Company v. United States and Walla Walla District Corps of Engineers, in the United States District Court, Western District of Washington, seeking to have the court declare that Groves was the lowest responsive, responsible bidder on schedules "B" and "C" of the IFB and that the plaintiff is entitled to the award of the contract for said schedules; and that the Corps be enjoined from taking any action pursuant to or in furtherance of an award under the IFB. Groves also moved for a temporary restraining order and a preliminary injunction. On July 3, 1975, the plaintiff's motion for preliminary injunction was denied. However, by order of July 16, 1975, denying the plaintiff's motion for reconsideration on the question of preliminary injunction, the District Court stated:

"Upon the authority of Wheelabrator Corporation v. Chafee, 455 F.2d 1306 (D.C. Cir. 1971), and pursuant to the request of both plaintiff and defendant, the Court requests that the General Accounting Office rule upon the issues raised by plaintiff in the protest filed by it with the General Accounting Office."

It is pursuant to that request that we are issuing our decision. See section 20.10 of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975).

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For purposes of ready reference, we have designated portions of this decision by numbers which appear in the left-hand margin. These numbers indicate the portions of the decision which correspond to the similarly numbered digests.

With regard to mistakes in bid alleged after bid opening but prior to award it has been held that where a bidder discovers that it has made a mistake in its bid and so advises the contracting officer, the bidder is not bound by its bid, Ruggiero v. United States, 420 F.2d 709 (Ct. Cl. 1970), and cases cited therein and, therefore, acceptance of the bid does not create a binding contract. 49 Comp. Gen. 446 (1970); B-165127, October 3, 1968. See also 36 Comp. Gen. 441, 444 (1956). In United States v. Lipman, 122 F.Supp. 284, 287 (E.D. Pa. 1954), the court recognized that the so-called "firm-bid rule," designed to protect the integrity of the competitive bidding system, is inapplicable if the bidder "* * *" can prove that the desire to withdraw is due solely to an honest mistake and that no fraud is involved." Where the bidder seeking withdrawal alleges such an error and furnishes evidence to make a prima facie case in support of the error, i.e., substantially establish the error, B-157348, August 4, 1965, we have stated that for the Government to make an award to that bidder the Government must virtually undertake the burden of showing that there was no error or that the bidder's claim of error was not made in good faith. B-160536, February 13, 1967; B-158730, May 4, 1966; 36 Comp. Gen., supra, 444. Therefore, upon the ultimate determination that a bona fide error was committed, withdrawal is permissible. B-157348, supra. See also 52 Comp. Gen. 258, 261 (1972). Conversely, where it can be concluded that no bona fide error has been committed, withdrawal is not allowable.

- 1.

As noted above, Valley indicated that a number of mistakes were made. In reviewing these errors, they appear to fall into three separate classes or types of errors, i.e., extension errors, errors in failing to properly carry forward figures from initial bid sheets to estimate recap sheets, and errors of omission from the bid sheets. We will address each of these areas in turn.

I. Extension errors.

By sworn affidavit dated June 12, 1975, the chief estimator for Valley stated that "* * * the estimate detail sheet for bid item 49 [for handling and delivery of generator parts] contains an extension error of \$15,500.00. The per ton unit of cost was mistakenly applied to crew hours ('UH') instead of tons."

The equipment cost for handling the estimated 3,500 tons of material was computed in the Valley worksheets by multiplying the cost per ton (\$5) by the number of hours that the 85-foot low boy unit was estimated to have operated (400); thus, total equipment cost is shown on the worksheets as \$2,000. Clearly, in computing total equipment cost, multiplying cost per ton by the anticipated number of hours would not lead to the desired figure. Rather, either cost per ton must be multiplied by the estimated number of tons or cost per hour must be multiplied by the estimated number of hours. Thus, Valley's estimator indicates that the cost per ton (\$5) should have been multiplied by the estimated number of tons (3,500) to derive a proper total equipment cost of \$17,500 (which is \$15,500 above the amount shown in Valley's worksheets). Although the Government's estimator, contrary to Groves' assertion, does not disagree with this method of computation, in his view total equipment cost could also be achieved by multiplying the estimated cost per hour of using the low boy (\$30) by the estimated number of hours (400) for a total equipment cost of \$12,000. Therefore, while the Government's estimator derives a different figure for equipment cost, it does seem quite clear that Valley did make an error in determining the costs upon which its bid was calculated in an amount ranging from \$10,000 to \$15,500 for item 49. However, since Valley's worksheets indicated a cost of \$62,551, while its bid on item 49 was only \$56,000, it is impossible to determine what effect this computational error would have had on Valley's bid if properly computed.

II. Errors resulting from the bidder's failure to carry forward figures to the estimate sheet.

(a) Labor for Powerhouse Crane Operator

This claim of mistake is based on Valley's allegation that it failed to carry forward \$47,050 regarding labor for a powerhouse crane operator in bid item 47. In this regard, Valley's worksheet No. 47-7 shows the following:

Labor	-	\$381,832
Labor add.	-	221,399
Equipment	-	700
Supplies	-	7,000
Permanent material	-	1,500
Subcontract	-	68,050
		<u>\$680,481</u>

However, Valley's spread sheet for the item indicates:

Labor	-	\$633,393 (\$381,832 + \$221,399 + 5%)
Equipment	-	700
Material	-	7,000
Material permanent	-	1,500
Subcontract	-	---

Total direct - \$642,593

Valley bid \$650,000 for this item.

The worksheets for item 47 indicate that the subcontractor costs were on subitems for--

- (a) Hoist equipment prior to bridge crane over units for embedded parts - not needed if crane capacity available

Labor	Labor add.	Subtotal	Subcontract
\$37,856	\$17,846	\$55,702	\$10,000

- (b) Operate bridge cranes for own use and also for generator manufacturer - includes intake and draft tube gantry cranes

			Labor	Labor add.	Subcontract
15 months	325 W.D.	1950			
	3/4 OE	man-hours--9.10	\$17,745	\$8,365	
15 months	325 W.D.	1950			
	3/4 EL	man-hours			\$37,050
Turbine electrical					21,000

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The agency supplemental report thus states that "[I]t is obvious from these sheets that the bidder did intend to include \$68,050.00 but failed to do so," and that the \$21,000 electrical subcontractor cost listed above, which both Valley and the Government had assumed to be included elsewhere in the Valley bid, after examination was found not in fact to be included. With regard to this latter point, the Government estimator's affidavit of June 25, 1975, stated:

"* * * \$21,000 of the \$68,050 omitted was plugged into the Sh. 47-7 under the sub-contractor column for Turbine Electrical. Burke's [the electrical subcontractor] electrical quote included \$32,000 for electrical work on the turbine which replaced the \$21,000. Therefore the total error was reduced by \$21,000 for a net error of \$47,050. * * *"

The agency report now states that neither the \$21,000 nor the \$32,000 amount quoted by the electrical subcontractor was accounted for any place in the bid. Thus, while it appears that Valley only claimed a \$47,050 error, the Corps is now of the belief not only that there was an error of omission but that error was more properly \$79,050 (computed as follows: \$68,050 (total subcontractor costs omitted) and \$32,000-\$21,000 (difference between actual turbine electrical subcontractor cost and those indicated by Valley)).

Consequently, the Corps now feels that the entire electrical subcontractor quote of \$32,000 for item 47 was not included in the bid. However, in reviewing the Burke electrical quote, we have also noted that the \$8,000 quoted for electrical subcontractor in item 48, shown on the initial worksheet as a subcontract cost of \$4,500, was not carried forward into the bid. It therefore appears that the total extension error made by Valley with respect to the Burke quote was \$40,000.

It is interesting to note that regarding an alleged omission regarding drayage infra, Groves points to the fact that \$40,000 above the subcontractor quote was included by Valley in bid item 96. While Groves argues that this \$40,000 constitutes drayage

costs, the Corps speculates that the \$40,000 actually is Valley's markup on the total Burke quote of \$913,113, although even the Corps recognizes that this only amounts to a 4.7-percent markup which is low for a contractor such as Valley. We agree that this rate of markup is low especially where the overall markup rate for the contract is 12 percent. We feel that the \$40,000 included in bid item 96 might more reasonably be the electrical contractor costs for item 47 (\$32,000) and item 48 (\$8,000). Such a theory would explain (1) why Valley did not initially claim an omission of the entire amount of subcontractor cost (note it only claimed subcontractor costs other than electrical), and (2) why Valley never has claimed an omission in item 48 for subcontractor costs.

Thus it appears that the maximum omission possible for subcontractor costs in item 47 is in fact the \$47,050 initially claimed by Valley.

With specific regard to that sum, Groves argues that the bridge crane operation figures from sheet 47-4, above, indicate total direct labor costs of \$26,110 as direct labor expenses plus \$37,050 for subcontract expenses. This \$37,050, it argues, would therefore duplicate cost already provided for since only one crane operator, not two, is required for the job.

The agency responds by stating that Valley intended to use the bridge crane not only for its own use in installing nonembedded parts but also for the use of the generator installer and installation of the turbine governors. Moreover, the agency indicates that Valley's worksheets demonstrate that it intended to furnish the crane's operating engineer on its own payroll but that an electrician would be furnished by the electrical subcontractor. This decision to use two men in the crane is a matter of the bidder's judgment.

Groves also argues that the \$55,702 set forth on page 47-1 of Valley's worksheet for direct labor costs, hoist equipment prior to bridge crane, was very close to the amount bid by Groves for bridge crane operation and thus may very well have included the cost of a crane operation. We agree. Moreover, we feel that Valley's direct labor cost in this area included the cost of two operators since its notations indicate two OE (operating engineers) 260 W.D. (workdays) 4,160 MH (man-hours) at \$9.10 per hour. Thus, 4,160 man-hours divided by 260 workdays equals 16 man-hours per workday or two crane operators. However, Groves seems to be implying that this cost factor would cover all crane operator costs.

In this regard, the agency's supplemental report gives the following explanation.

"(2) The principal crane for installing turbine and generator parts (and for later servicing and repairs) is a bridge crane. This type of crane spans the width of the powerhouse just under the roof, and moves on rails placed along the top of the powerhouse walls. During the early part of the contract, the powerhouse walls would be under construction; hence the bridge crane will not be available over the new units until the powerhouse is constructed and the crane rails are extended.

"Valley recognized these realities. On Sheet 47-1 it provided for 12 months of crane service before the bridge crane becomes available (i.e., 'prior to bridge crane'), and during installation of 'embedded parts.' of this crane service, as shown on Sheet 47-1.

* * * * *

"On Sheet 47-4 Valley provided for bridge crane service for 15 months, for installation of nonembedded parts. This would be an entirely different time frame from the crane charges shown above. Valley would also use the bridge crane for service to the generator installer and installation of the turbine governors. * * *"

Therefore, while sheet 47-1 provides for crane operation as does sheet 47-4, we do not agree that this was a duplication.

Groves also references the fact that sheet 47-7 of Valley's workpapers indicates for the nonembedded parts a total of 10.175 man-hours of labor would be required for each ton while on another job only 6.87 man-hours per ton (including crane operation) were used to perform a similar task. On this basis Groves argues that the crane operation subcontracting, the costs of which were allegedly omitted from Valley's bid, could have been included in Valley's direct labor. However, Groves neglects the fact that on a third job 8.21 man-hours per ton excluding crane operation were necessary and that Valley's worksheet No. 47-4 indicates that only 0.5 man-hours per ton were necessary for crane operation on nonembedded parts (less than 5 percent of the total 10.175 man-hours per ton. We do not feel, therefore, that any

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conclusion as to the alleged inclusion of the proposed subcontract work into direct labor can be made.

Finally, Groves argues that Valley's claim of error in omitting subcontractor costs in item 47 is refuted by a conversation held on June 6, 1975, between a Groves' vice president and the president of Valley.

The June 27 affidavit of the Groves' vice president states:

"* * * On June 6, 1975, * * * [the president of Valley] and I discussed in detail the use of an overhead crane at the job site. At no time during this discussion did * * * [he] suggest that Valley may have omitted the cost of operating said crane."

The contrary affidavit of Valley's president, however, states:

"At the time of the meeting, we had not fully completed our review. Neither at the conclusion of the meeting nor at any other time during the meeting did I advise * * * [Groves' vice president] that we had not made any error or that we were satisfied with the direct costs and general expenses."

In view of these statements we can understand that Valley may not have been aware, as of June 6, of this specific mistake but this does not say that such a mistake was not made.

In sum, we believe that the Corps did have a reasonable basis upon which to conclude that Valley had made a bona fide mistake on item 47 in the amount of \$47,050.

(b) Costs of Storage Area Grading, Fencing and Heating

The affidavit of Valley's chief estimator states for item 45 that "In taking these figures from the detail sheets and transposing them to the estimate recap sheet, I inadvertently did not include the general expense items of * * * storage area facilities. The estimated amount on * * * the storage area was \$12,400."

As explained by the Government's estimator on sheet 45-1 of its workpapers, Valley listed \$8,400 for grading and fencing for the storage facility and \$4,000 for heating. The workpaper also originally indicated that the subtotal of labor, labor add., equipment and supplies equaled \$98,113 and when the \$12,400 in

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subcontract cost was added a sum total of \$110,513 was obtained. However, the sheet indicates that labor cost was increased by 5 percent, bringing the new subtotal to \$101,177. For some reason the \$12,400 subcontractor was not, however, added to this figure and it was the figure of \$101,177 that was carried forward as the total direct cost on the spread sheet. We note the spread sheet showed no entry for subcontractor costs in item 45. Valley's bid for this item was \$108,000 with a unit price of \$15 per ton month.

Groves argues that the most sheet 45-1 does is to establish that \$12,400 in cost was not initially carried to the spread sheet. However, it first contends that this omission may have been intended and the \$12,400 may have been included elsewhere in Valley's bid-- such as costs for General Conditions and Yard. Secondly, it states that the Corps completely ignores the fact that while Valley's stated direct cost for item 45 was \$101,177, its bid amounted to \$108,000 (an increase of \$6,823).

As to this last point, the Corps notes that the IFB indicates a quantity of 7,200 ton months of storage for item 45. Thus, Valley's estimated total cost for storage per unit (ton month) equaled \$101,177 divided by 7,200, or \$14.05/ton month. The Corps feels that as can be seen on sheet 45-1 from the unit price figure of "15" beside the bid price of \$108,000, Valley merely rounded the \$14.05 figure up to the next whole dollar and multiplied that by the 7,200-ton-month estimate to arrive at the price of \$108,000. The Corps states "Thus it is obvious that this adjustment in the amount of \$6,823.00 was not intended to cover the omitted costs of \$12,400.00."

As to Groves' contention that the omission of the subcontractor costs was deliberate and the \$12,400 included elsewhere in Valley's bid, presumably in the direct cost figures of General Conditions and Yard, first, the sworn affidavit of Valley's president states that the claimed errors were unintentional and, secondly, we have examined all Valley's direct labor costs in the area of General Conditions and perceive of no basis upon which to sustain Groves' allegation. Accordingly, we believe that there is a reasonable basis upon which to conclude that Valley's mistake in this area was bona fide.

III. The omission errors.

(a) Unwatering (item 114)

(1) header for unwatering

The affidavit of Valley's estimator states:

"* * * existing water relief pipes require the contractor to protect his work area from relief water discharged into the lower reaches of the draft tube. We anticipated installation of a collection header for this purpose. My review of the estimating sheets indicates that no provision is made in the bid for this header. A reasonable estimate of the cost of the header is approximately \$115,000."

Groves asserts that this alleged error is based upon an omission, that is, nothing in the worksheets which would support Valley's claim, and the claim is directly refuted by the statements made to Groves by Valley on June 6, 1975, which "* * * clearly and unequivocally stated that Valley's bid included a false decking to avoid the draining water, and it did not contemplate the use of a header collection system." However, by sworn affidavit the president of Valley specifically states that during the June 6 meeting between himself and Groves' vice president:

"I told him that we had neglected to include in our bid either a header system or a false deck as a portion of the dewatering item. I further told him that after the bid we discovered this, and I was then of the opinion that a false deck approach might be cheaper, if it would work and we were required to accept the award. * * *"

In view of the above, we can draw no conclusions from the June 6 conversation.

2. We feel that in cases involving errors of omission, typified by those here presented, a sworn affidavit outlining the nature of the error, its approximate magnitude and the manner in which the error occurred can constitute substantial evidence thereof. See 52 Comp. Gen. 258, supra. This fact does not, however, detract from the agency's obligation to weigh all of the evidence so as to determine that a bona fide error was in fact committed.

Here we have been presented with no evidence upon which to conclude that the Valley error was not bona fide although Groves questions the magnitude of the error by stating that it had included such a header in its bid at a total of \$20,000. Moreover,

it argues that the Corps accepted the amount of Valley's error (\$115,000) without even comparing that figure to the agency's own estimates. The record as it relates to the magnitude of the error is somewhat sketchy; needless to say, the amount of the error was probably somewhere within the range of \$20,000-\$115,000 although we do not feel that Groves' costs are necessarily determinative of Valley's costs or that the precise amount can be quantified.

(2) power for pump (unwatering)

Again Valley asserts an error of omission by sworn affidavit. Moreover, we have been presented with conflicting sworn affidavits concerning alleged statements made by Valley in a June 6 conversation with Groves and again cannot therefore draw any conclusions therefrom.

Thus, the only relevant information is, first, the allegation made by Groves that the alleged omission could have been included in the bid in a variety of ways, but, of more significance, the allegation that Valley had failed to consider the salvage value of the pumps themselves in calculating its bid. In this regard, Groves states that Valley's estimate summary for unwatering, which shows three 7,500-gallon pumps at a total estimated material cost of \$89,280 and six 2,500-gallon pumps at a total estimated material cost of \$90,192, effectively charged off the entire cost of the pump to this job while the pumps have considerable salvage value. As Groves points out, as can be seen elsewhere in the Valley worksheets (see exhibit 5 of Government estimator's affidavit), Valley usually figured the cost of buying large items less the selling price in computing the total charge to the contract. Groves states that "[a] not unreasonable salvage figure of 50% could have produced a savings of nearly \$90,000, and nearly covered the alleged cost of this entire claim of error."

The Corps states as to Groves' contention regarding the omission of salvage that "[t]his would not be a provision for the cost of electricity; merely an offsetting error. Assuming such error, the \$90,000 salvage value offset against \$110,000.00 [omission] for electricity costs would still leave an error of \$20,000 -- still a substantial sum."

Groves also alleges that the \$110,000 error for pump power was included in the General Condition section of Valley's estimate under Electrical, Maintenance & Distribution, Labor, for which it believes

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Valley's figure of \$175,000 is "grossly excessive." The portion of Valley's worksheets in question indicates:

<u>Description of Work</u>	<u>Total Estimated Quantity</u>	<u>Unit Price</u>	<u>Total Estimated Material Cost</u>
<u>Electrical</u>			
* * *			
Usage:	35 mo.	\$ 500	\$ 17,500
Maintenance & Distribution Labor	50 mo.	3,500	175,000
Supplies	30 mo.	200	9,000

The Corps argues that since the \$175,000 figure is labeled "Labor," there is no reason to assume that it includes material such as power for the pumps. However, the Corps points out that the unit price of \$3,500 per month closely approximates the labor costs for two electricians working 5 days per week (2 men x 8 hours x \$9.81 (minimum wage cost per contract) = \$156.96, and \$156.96 x 22 workdays per month = \$3,453.12. which was rounded to \$3,500/month and when multiplied by the required 50-month period equals \$175,000. Thus the Corps did have a reasonable basis upon which to conclude that the \$175,000 figure did not include the \$110,000 omission for pump power.

Moreover, we perceive of no basis upon which to conclude that the agency's determination that Valley's \$110,000 claim of error was not bona fide. However, the evidence presented would seem to indicate that an additional partially, offsetting mistake may have been made in an amount of approximately \$90,000.

(3) handling and setting up stoplogs

In support of its conclusion that Valley's bid omitted \$40,000 in cost for handling the stoplogs, the Corps cited (1) a memorandum dated May 24, 1975, from Mr. Lane, one of Valley's estimators, which in pertinent part states that "* * * I Presume that the hauling of the 3,540 tons of stoplogs will be included with Bid Item 114a 'Initial Unwatering,'" and (2) the fact that Valley's detail sheet No. 114 which involves bid items 114a and 114b and is headed Unwatering Facilities Furnish, Install, Operate, Maintain & Remove includes an entry for an item "Haul Gov't Conc Stoplogs" but no dollar figure is entered aside it. The Corps states that these two facts indicate

that Valley intended to provide for this work in the bid and to do so in item 114a.

Groves argues that the stoplog costs could have been included in item 6 for concrete work. However, the Corps states that since the function of stoplogs is to hold water out of the area to be dewatered, stoplog cost would logically be part of unwatering (item 114). Moreover, its careful examination of bid item 6 did not indicate any bidder stoplog cost. In this regard, we have examined Valley's figures for item 6 and do not find any indication that stoplog costs were included in that item.

Groves also asserts that since there is no worksheet to indicate the component of Valley's estimated cost there is no evidence to show that stoplog costs were omitted from item 114. We agree that in the absence of information concerning the components of the Valley bid 114, it is difficult to determine which constituent elements were considered and which were not. However, in reaching a conclusion that stoplog costs were omitted, the Corps did have before it (1) Valley's allegation of omission, (2) the memorandum and unfigured worksheets mentioned above, and significantly (3) the Valley bid itself.

In this regard, the following analysis of Valley's bid for item 114 is pertinent.

The sum of the above-noted three omissions in the area of unwatering (item 114) total \$265,000. Groves argues that while Valley's bid for item 114a and b was \$180,266 and the Corps' estimate was \$319,000, closer analysis belies the fact that Valley's bid was low. As can be seen in Valley's adjustment worksheets, the following occurred with regard to item 114a and b:

	<u>Initial Figures</u>	<u>Adjustment</u>	<u>New Amount</u>	<u>Bid Column</u>	<u>Adjustment</u>	<u>Actual Bid</u>
114a	\$ 75,000 ¹	+ \$36,000 ²	\$111,000 ³	\$135,269 ⁴	\$15,000 ⁴	\$150,269 ⁴
114b	50,000 ¹	+ 59,000 ²	109,000 ³	30,000 ⁴	-0- ⁴	30,000
	<u>\$125,000</u>		<u>\$220,000</u>			<u>\$180,269</u>

1 adjustment sheet and spread sheet

2 adjustment sheet - figures part of total \$235,000 in adjustment

3 adjustment sheet - only

4 spread sheet - only

Groves states that item 114 was not adjusted to the full amount of \$220,081 which appears in the estimate summary for unwatering. If, as Groves would have us do, the entire amount of the adjustment were reflected in item 114, then Valley's bid would, we feel, have been the \$220,081 shown in its worksheets. Thus, when the \$265,000 in omission errors is added Valley's bid is \$485,081 or \$166,081 more than the Corps' estimate. However, if Groves is correct in its assertions noted above that Valley (1) did not include the salvage value of the unwatering pumps, thus unduly inflating its costs by \$90,000, and (2) overestimated the cost of the omission of a collection header by an additional \$90,000 the Valley more accurate bid should have been \$305,081, or \$14,000 less than the Corps' estimate.

Groves argues that the adjustment sheet shows an adjustment of \$36,000 for item 114a and \$59,000 for item 114b for a total adjustment of \$95,000 yet only \$15,000 appears in the adjustment column of the spread sheet.

Groves calculates that if the entire adjustment had been recognized then Valley's bid (without profit) would have been \$262,266 (we calculate \$260,269). Thus, when the \$265,000 in alleged omissions is added, Valley's bid (without profit) would have been \$527,266 (we calculate \$525,269) as compared with the Corps' estimate. However, as noted above, if Groves is correct regarding the salvage value of the unwatering pump and overestimated cost of a collection header then by Groves' own figures Valley's bid (without profit) should have been \$527,266 - \$180,000 or \$347,266 (or only \$28,266 above the Government estimate).

Since, by our calculation, Valley's reconstructed bid price is less than the Corps' estimate and by Groves' calculations exceeds the Corps' estimate by only \$28,266, we see no basis to question the validity of the omission errors, for we note that Groves' own bid for item 114 totaled \$1,280,000 or \$961,000 more than the Corps' estimate while Atkinson bid \$780,000--(\$461,000 more than the estimate).

When viewed against this background we cannot say that any of the Corps' determinations as to the bona fide nature of the three mistakes of omission Valley alleged with regard to item 114 were without a reasonable basis.

(b) Drayage

As to the omission the chief estimator for Valley states that:

"First, the estimate as bid failed to include drayage related to installation of electrical items. The contract documents provide that the Government will furnish a substantial amount of electrical materials and equipment, and require the contractor to haul, handle and warehouse these materials and equipment. The quotation from the electrical subcontractor used in our bid excluded hauling and storage of this Government furnished equipment. However, in recording this quotation, this exclusion was not noted. As a result, the quotation was carried forward into the bid without addition of the costs of drayage. We presently estimate that the costs so omitted would total approximately \$45,000."

Groves refutes Valley's contention concerning drayage by stating that:

"Both Valley and Groves were using Burke Electric as a subcontractor on the electrical aspect of the work. A comparison of the bids of Valley and Groves on bid items 51 through 96 demonstrates that they are identical, with the exception of bid items 95 and 96. Moreover the amounts bid by Valley and Groves on bid items 51 through 96, are identical to the Burke quote, except for items 95 and 96. Groves, which faced precisely the same drayage expense as Valley, added \$50,000 to the Burke quote on bid item 95. Valley added \$40,000 to the Burke quote on bid item 96. Valley's \$40,000 addition to the quote on bid item 96 is totally unexplained and, we submit, was obviously made to cover the drayage expense.

"Any slight degree of care in evaluating Valley's claim of error would have clearly revealed this discrepancy, and conclusively demonstrated that no mistake was made."
(Emphasis added.)

However, in view of our feeling, stated above, that the \$40,000 included in item 96 most probably was electrical subcontractor costs omitted from items 47 and 48 of Valley's bid, there would seem to be no basis to conclude that the \$40,000 covered drayage. Moreover, we note again the Corps' belief that the \$40,000 covered contractor markup of the subcontractor's quote. While we do not agree with the Corps, the fact remains that since the \$40,000 does not relate to drayage, Groves has presented and we perceive of no plausible basis to counter the assertion that a \$45,000 omission for drayage was made and thus conclude that the mistake was bona fide.

(c) Transport of Government-furnished Equipment

The affidavit of Valley's chief estimator states:

"* * * the detail estimate for bid items 47, 48 and 49 assumed that the drayage equipment (truck and trailer) was included in the general equipment requirements list for the project. The general equipment lists assumed that the drayage equipment was included in the detail estimate for these bid items. As a result, the cost of the drayage equipment, approximately \$125,000.00, is not included in the bid at all."

As pointed out by the Corps, Valley's worksheet 47-1 initially indicated \$15,000 for equipment and \$12,750 for supplies but both figures were struck out and not carried to the spread sheet. The Corps' estimator states that Valley's estimator thought these costs would be picked up in the General Conditions - Equipment Schedule, but in fact they were not.

Groves alleges that since the Corps does not agree with Valley as to the \$125,000 amount allegedly omitted it "* * * develop[ed] a new error theory not even asserted by Valley in its claim."

We do not agree. It appears to us that the Corps in looking at the assertion of a \$125,000 omission made a sub silentio determination that a bona fide \$125,000 mistake had not been made but that a bona fide mistake of \$27,750 (\$15,000 + \$12,750) had in fact been made. This role of the agency is quite proper and consistent with the view expressed earlier in this decision.

Groves also argues that since Valley struck the relevant figures from its worksheets, the clear inference is that their omission was intentional. We do not disagree that a conclusion that the figures were omitted would be reasonable. However, in the usual case it would appear equally as reasonable to conclude, as did the Corps, that the costs should have been listed in the equipment schedule. This is not the usual case, for Valley's assertion of error was based on \$125,000 and not on the \$27,750 found by the Corps. If Valley had asserted a claim for the lower figure, since it would be just as likely that an unintentional omission in that amount was made as that the omission was intentional, we would have to conclude that a reasonable basis existed that the mistake was bona fide.

However, since Valley chose not to base its claim on the omission from sheet 47-1 but instead and, without more, alleged a mistake nearly five times greater than the 47-1 omission, we do not feel there remains equal likelihood that the mistake was unintentional as intentional. We therefore do not believe that a reasonable basis existed to find this error to be bona fide.

In sum we have concluded that a number of bona fide errors occurred as follows:

	<u>Amount</u>	
Extension errors	\$ 10,000 -	\$ 17,500
Cost for power crane operation	47,050 -	47,050
Cost of Storage area grading, fencing and heating	12,400 -	12,400
Header for unwatering	20,000 -	115,000
Power for unwatering pumps	110,000 -	110,000
Handling and setting up stoplogs	40,000 -	40,000
Drayage	<u>45,000 -</u>	<u>45,000</u>
	\$284,450	\$386,950
Salvage value of pumps	<u>-90,450</u>	<u>---</u>
	(1.6%) \$194,450	\$386,950 (3.2%)

Thus we perceive of errors in Valley's \$11,849,090 bid in an amount between 1.6 and 3.2 percent of the bid price.

Groves argues that to allow withdrawal of a bid, the amount of the error should constitute a material mistake view against the bid price. It states that:

"A requirement of materiality is essential to preserve the integrity of the competitive bid system. It is apparent that in every large construction project, involving a multitude of bid items, a likelihood of mistake exists. The bidders know that, and know that favorable and unfavorable mistakes are made in making up a bid, but they nevertheless do bid, and expect to be awarded contracts in the amounts stated in the bid. If insubstantial mistakes were a basis for withdrawal of a bid, the firm bid rule (19 Comp. Gen. 761 (1940)) and the competitive bid system would be seriously undermined."

It is true that on large projects there is a possibility that some error exists in almost every proposal and that if these errors

could provide a basis for withdrawal the firm-bid rule could in practice be substantially weakened. However, as stated in Rhode Island Tool Company v. United States, 128 F.Supp. 417, 418 (Ct. Cl. 1955):

"A rather well-established rule of law seems to be that after bids have been opened the bidder cannot withdraw his bid unless he can prove that the desire to withdraw is due solely to an honest mistake and that no fraud is involved. * * *"
Cases cited. Accord. Ruggerio v. United States, supra.

3. In this context the cases discussing withdrawal do not speak to the materiality of the mistake made but rather to whether the mistake was an honest one. We do not discount the possibility of applying a de minimis rule; however, in view of the magnitude of the mistake involved, we do not think the de minimis issue arises. Therefore, withdrawal may be permitted.

Groves further contends that the Corps acted improperly in making an award to Atkinson for schedules "A," "B" and "C" without concluding that there was a mistake made by Valley on schedules "B" and "C" of its bid as well as schedule "A." Note--Valley was permitted to withdraw on all schedules, and absent the withdrawal the following bid combinations would have been lowest:

- | | |
|----------------------------------|--------------|
| 1. Valley schedule A | |
| Groves schedules B and C | \$40,317,367 |
| 2. Valley schedule B | |
| Groves schedules A and C | 40,686,345 |
| 3. Valley schedule C | |
| Atkinson schedules A and B | 40,809,631 |
| 4. Atkinson schedules A, B and C | 42,168,036 |

Groves argues that since the findings and conclusions of the Corps relating to Valley's claim give no reference as to what disposition was made of Valley's claim on schedules "B" and "C," the Corps did not follow its regulations in allowing Valley to withdraw on all three schedules.

In this regard, the June 12 affidavit of Valley's president indicates that "The extent of the mistakes in Schedules B and C is approximately the same [as that in Schedule A]." Moreover, we note that certain of Valley's relevant worksheets indicate that although the computation was done for the Little Goose project (schedule "A"), the costs for schedules "B" and "C" were identical, e.g., sheet 47-1 (noted above) and sheet 48. Accordingly, we see no reason upon which to conclude that no reasonable basis existed for the Corps' sub silentio determination that the mistakes in schedules "B" and "C" were bona fide thus allowing for withdrawal.

4. Groves argues that irrespective of the Valley withdrawal it is entitled to award on schedules "B" and "C." In this regard Groves cites D & L Construction Co. & Associates v. United States, 378 F.2d 680, 685 (Ct. Cl. 1967), which holds that the relative order of bids is to be determined at the time of bid opening. As a general rule, we agree with this pronouncement and believe that, as Groves has pointed out, this is what the Corps did, i.e., a Valley-Groves' combination resulted in the lowest cost as well as the second lowest cost while other combinations were set out in order of their low cost.

However, as we have stated in the past, where awards on a combination of schedules is contemplated the award made must result in the lowest cost to the Government to carry out the mandate of 10 U.S.C. § 2305(c) (1970) which requires that award be made to the responsible bidder(s) whose bids will be most advantageous to the Government, price and other factors considered.

Accordingly, upon Valley's withdrawal, it was incumbent upon the Corps to make an award to the responsive, responsible bidder or combination of bidders whose bids were still available which represented the lowest cost. In making award to Atkinson the Corps did so.

Groves lastly questions the procedural aspects of the award, the Corps' alleged failure to consider relevant evidence in making the decision on Valley's withdrawal and the Corps' failure to determine Valley's intended bid.

5. Groves argues that the protest was filed before award and that the Corps did not make the necessary findings in accordance with ASPR § 2-407.8(b)(3) (1974 ed.) to make an award. However, as indicated above, the Corps furnished telegraphic notice of award to Atkinson on June 19, 1975, at 1 p.m. In accordance with ASPR § 2-407.1 (1974 ed.), this telegraphic notice of award constituted an official award of the contract. See B-176941, November 28, 1972. The cited ASPR section states in pertinent part that:

"* * * Awards shall be made by mailing or otherwise furnishing to the bidder a properly executed award document * * * or notice of award * * *" (Emphasis supplied.)

Therefore, since Groves' protest was filed after the Corps forwarded notice of award to Atkinson the protest must be considered as being filed after award.

With regard to the allegation that the Corps failed to consider relevant evidence, relating to the June 6 conversation between Valley and Groves we note that the Corps' D&F specifically indicates that Groves' statements regarding the content of those conversations were considered. Moreover, both Groves' affidavit and that of Valley's on the content of the June 6 discussions were reviewed by this Office and were, to the extent possible in view of many direct conflicts, taken into consideration in reaching our conclusion on the issues raised.

6. Lastly, Groves notes ASPR § 2-406.3(a) (1974 ed.) which states:

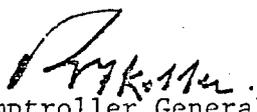
"* * * if the evidence is clear and convincing both as to existence of the mistake and as to the bid actually intended, and if the bid, both as uncorrected and as corrected, is the lowest received, a determination may be made to correct the bid and not permit its withdrawal."

However, as can be seen from the lengthy analysis above, it would have been a near impossibility to ascertain the intended bid price with the degree of accuracy required by the regulation. And while it may be that Valley would have been low in any event (note even adding its claimed mistake in excess of \$580,000 Valley's bid would have been low), still it would not have been possible to make award to Valley for a sum certain, which is what we believe is required by the regulations. That is, both the specific

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items intended to be bid and the specific prices intended to be bid must be apparent to permit a valid award to be made. Cf. 16 Comp. Gen. 272, 274 (1936). See generally, Leonard Joseph Company, B-182303, April 18, 1975, 75-1 CPD 235.

For the reasons set forth above, Groves' protest is accordingly denied.


Deputy Comptroller General
of the United States